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Supreme Court of the United States.

October Term, 1935.

No. 125.

Palmer Clay Products Company,
Petitioner,

v.

Matthew Brown, Trustee,
Respondent.

BRIEF FOR RESPONDENT.

HARRISON J. HARRETT,
MATTHEW BROWN,
Attorneys for Matthew Brown, Trustee in Bankruptcy of Washington Builders Supply Company.

Appeal (J. Williams & Son, Law Printers, Inc.)

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 125.

PALMER CLAY PRODUCTS COMPANY,
Petitioner,
v.
MATTHEW BROWN, TRUSTEE,
Respondent.

RESPONDENT'S BRIEF.

Statement of the Case.

The facts involved in this appeal are set forth in detail in the Transcript of Record which accompanied the writ of certiorari filed by the petitioner in this case, and will be referred to as the Transcript of Record.

The Metropolitan Builders Supply Company was adjudicated a bankrupt under an involuntary petition in bankruptcy filed against it on January 14, 1933, and the respondent was duly elected trustee in bankruptcy on the 28th day of February, 1933. On November 8, 1932, the petitioner was a general unsecured creditor of the Metropolitan Builders Supply Company for merchandise sold prior thereto in a total sum of $2088.29. No merchandise was sold by the petitioner to the bankrupt after November 8, 1932. (See Transcript of Record, page 11, line 10.)

Between November 8, 1932, and January 3, 1933, the petitioner received, in full payment of its balance due, the sum of $2088.29, receiving $1688.29 from the Metropolitan

Builders Supply Company on the following dates, and in the following amounts:

November 25, 1932,	$143.64
November 25, 1932,	4.79
December 6, 1932,	425.94
December 13, 1932,	654.91
December 29, 1932,	459.01

and, in addition thereto, received the sum of $400 on December 5, 1932, from Louis B. Cadario & Son, a third party, from whom the petitioner had, prior thereto, received a guarantee, the said guarantor having received no security or right to any of the assets of the said Metropolitan Builders Supply Company for the giving of said guarantee to the purchaser. Suit was brought by the respondent to recover these payments as preferential; and, after hearing, the trial justice of the Municipal Court of the City of Boston found for the respondent in the sum of $1688.29, and made the following findings of fact:

> "I find that on November 8, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class." (See Transcript of Record, page 13.)

The petitioner filed certain requests for rulings. The trial justice denied its request for ruling No. 8, which was as follows:

> "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class

could at the time of each payment have received." (See Transcript of Record, page 19.)

Following the above finding, the petitioner requested the Appellate Division of the Municipal Court of the City of Boston to report the case to the Supreme Judicial Court of Massachusetts. The Appellate Division refused to report the case, dismissing the petitioner's request. (See Transcript of Record, page 5.)

Thereupon, the petitioner filed its claim of appeal from this ruling to the Supreme Judicial Court of the Commonwealth of Massachusetts. That Court, after hearing, sustained the ruling of the Appellate Division, stating that in its opinion no error of law had been committed by the Trial Court in denying the plaintiff's request for ruling No. 8.

Statement of the Issues.

The sole question presented to the Supreme Judicial Court of Massachusetts by the petitioner on appeal was the correctness of the refusal of the trial justice to grant its request for ruling No. 8. It was the petitioner's contention that, while the Supreme Court of Massachusetts had decided this question adversely to it in accordance with its ruling in the case of *Rubenstein* v. *Lottow*, 223 Mass. 227, the refusal to grant this request was in conflict with the law as apparently set forth in certain Circuit Court of Appeals decisions of the Eighth Circuit. The petitioner, in its brief annexed to its petition for writ of certiorari, filed in this Court, set forth that in its opinion the issues raised were as follows:

"(1) Whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.

"(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class.

"(*a*) What percentage creditors of the same class would have received at the date of the actual payment or transfer, or

"(*b*) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

"(3) Whether or not the Massachusetts State Courts acted erroneously in refusing the Petitioner's request for ruling of law, which was as follows:—

" 'The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received.' "

This is the question of law that the petitioner would present to this Court as the basis for its appeal.

It is the respondent's contention that the findings of fact made by the Trial Court make the determination of the above questions of law immaterial, and that therefore the verdict of the Trial Court must stand, regardless of this Court's decision on this question of law.

It is the respondent's contention, further, that if the question of law is open on appeal, then the decision of the Supreme Judicial Court of Massachusetts in this case affirming the rule laid down by it in *Rubenstein* v. *Lottow*, 223 Mass. 227, to wit, That the question as to whether or not a creditor of an insolvent debtor has received a preference under sections 60*a* and 60*b* of the Bankruptcy Act is

to be determined by ascertaining if the ultimate result and effect of the enforcement of the transfer will be to enable such creditor to obtain a greater percentage of his debt than any other creditor of the same class will receive from the bankrupt estate, should be affirmed.

The pertinent sections of the Bankruptcy Act, Act of July 1, 1898, c. 541, 30 U.S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U.S. Sts. at Large, 799, c. 487, sec. 13, and by Act of June 25, 1910, 36 U.S. Sts. at Large, 842, c. 412, sec. 11, which are called in question are as follows:

"Sec. 60, Preferred Creditors.

"(*a*) A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the *effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.* Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required or permitted.

"(*b*) If a Bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing

thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Argument on the Merits.

I. The facts found by the Trial Court make the determination of the question of law sought to be raised by the petitioner immaterial, and therefore the finding of the Trial Court should stand even if the question of law was erroneously ruled upon.

We start off with the indisputable principle of law that the findings of fact as made by the Trial Court are final on appeal to this Court. The petitioner had adequate opportunity in the Court below, by requests for rulings and exceptions to the findings of fact, to protect its rights on this issue.

It cannot here attempt to argue that the findings are erroneous or not supported by the evidence or endeavor to introduce additional facts.

Reid v. *Doherty*, 273 Mass. 388.
Richards v. *Appley*, 187 Mass. 521.
Hedrich v. *A., T. & S.F. Railroad Co.*, 167 U.S. 673, 677.
Bement v. *National Harrow Co.*, 186 U.S. 70, 83.
Jenkins v. *Neff*, 186 U.S. 230.

As was stated by this Court in the case of *Kaufman* v. *Tredway*, 195 U.S. 271, which dealt with a question of preference—

> "Whether the bankrupt was insolvent when he paid the money to his brother, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court."

The petitioner therefore cannot here argue for the first time that it was a secured creditor having a guarantee from a third person, or that no evidence was introduced as to what percentage of their claims could be paid to all creditors of the petitioner's class on the dates when the various payments were made, nor as to what dividends were paid to creditors generally.

And, even if it could, it is obvious that the holding by the petitioner of a guarantee of a third person did not place it in a different class from all other general unsecured creditors, there being only two classes of creditors in bankruptcy distribution—(1) Those entitled to be paid in full as priority creditors, and (2) Those creditors who are entitled to equal distribution after priority claims have been paid, and this without regard to whether they are secured or unsecured creditors.

Swartz v. *Fourth National Bank*, 117 Fed. 1 (C.C.A. 8th).
Livingston v. *Heineman*, 120 Fed. 786.
Gorman v. *Wright*, 136 Fed. 164.

The Trial Court has here found as a fact that "on November 8th, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders

Supply Company was insolvent, and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class."

In the case of *Eau Claire National Bank* v. *Jackman*, 204 U.S. 522, 534, *et seq.*, a suit was brought by the trustee in bankruptcy to recover a preferential payment from the Eau Claire National Bank under sections 60*a* and 60*b* of the Bankruptcy Act. In that case the Trial Court found as a fact that certain transfers of property were made to the bank by the bankrupt, and that the bank, when receiving the payments, had reasonable cause to believe that the bankrupt intended to give such a preference "to enable it to obtain a greater percentage of its indebtedness than any other of his [the bankrupt's] creditors of the same class would be enabled to obtain." The petitioner attempted in this Court to raise certain questions of law which it claimed had been erroneously ruled upon by the Trial Court, to wit:

(*a*) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to receive any portion of his debt, constituted a preference.

(*b*) That, although the effect of the transfer in question did not operate to give back a greater percentage of its debt than other creditors of the same class, such transfer constituted a preference.

This Court refused to consider such assignments of error, stating the following:

"On the merits of the case we start with the facts established against the bank, that the property of Young [the bankrupt], at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to

pay his debts, and that by the execution of those instruments and the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had reasonable cause to believe that he intended thereby to give it a preference, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment. . . ."

"Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive. And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the facts found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the Supreme Court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside."

If, then, this Court in the Eau Claire National Bank case stated that the findings of fact in that case justified the judg-

ment, then it would appear to the respondent that here too the findings of fact justified the judgment, and that the questions of law presented are immaterial.

Dutcher v. *Wright*, 94 U.S. 553, at 557.

Assuming, however, that the findings of fact do not in themselves warrant this Court's permitting the judgment to stand, the respondent submits that the evidence appearing in the transcript of the record before this Court, rendered the petitioner's request for ruling No. 8 immaterial. Therefore the ruling of the trial justice, refusing to grant this request, was not prejudicial to the petitioner even if it was erroneous ruling, and should not result in a reversal of the Trial Court's finding by this Court.

The payments received by the petitioner in this case total the full amount of its claim, to wit, $2088.29, it having received the sum of $1688.98 directly from the bankrupt corporation, $1500 of this amount having been received by the petitioner between November 25 and December 29, 1932, a period of approximately thirty days. (See Transcript of Record, page 12.)

The transcript of the record contains (see pages 15 and 16) two balance sheets of the Metropolitan Builders Supply Company as of November 1, 1932, and December 1, 1932. The transcript of the record indicates that if the assets, taken at their fair market value, had been distributed *pro rata* among creditors on November 1, 1932, almost thirty days prior to the first payment to the petitioner in this case, creditors would have received approximately 70% of their claims. (See Transcript of Record, pages 7 and 8.)

If the assets had been distributed on December 1, 1932, creditors of the same class as the petitioner would have received approximately 50% of their claims. If the assets had been distributed on or about January 14, 1933, credi-

tors would have received approximately 20%. (See Transcript of Record, page 8.)

It is obvious that if distribution had been made at intervening times between December 1, 1932, and January 14, 1933, creditors would have received somewhere between 50% and 20%, depending upon how near to December 1, 1932, the distribution was made.

Since the record indicates that the payments were made to the petitioner between November 25, 1932, and January 3, 1933, it would appear fair, in estimating what could have been paid to creditors at the date of each payment, to ascertain what the average distribution would have been between these dates. This figure would have been approximately 40% between November 25 and December 15, and approximately 25% between December 15 and December 29, 1932, bearing in mind the rapidity of the shrinkage of the assets.

The petitioner actually received from the bankrupt corporation during this period approximately 80% of its claim, each of the payments made in December being a larger percentage than could probably have been then paid to other creditors of the same class if the assets had been distributed at the time of each payment. And since these payments were so close, should they not as a matter of fact be considered in the nature of one payment? Is it not therefore clear that, even under the rule sought to be established by the petitioner, it has received a larger percentage of its debt than could have been paid to other creditors at the time it received the payments, and therefore it suffered no prejudicial error in the failure of the Trial Court to grant a request based on this proposition of law?

It would appear proper, therefore, in accordance with principles of justice, to hold that the refusal by the Court to grant a request rendered immaterial by the facts should not be ground for the overturning of a decision arrived at after

a hearing and a mature consideration of the facts. And the law appears to support such a conclusion.

(See section 269 of the Judicial Code of the United States.)

The rule is enunciated in many cases that, even though an error of law is committed in the conduct or disposition of a case, if substantial justice was done the parties, and the error was immaterial, the finding should be allowed to stand.

Eau Claire National Bank v. *Jackman,* 204 U.S. 522, 534, *et seq.*
Virginia R.R. & Power Co. v. *Smith & Hicks, Inc.,* 105 S.E. 532 (Va.).
Green v. *Ruffin,* 125 S.E. 742 (Va.).
West v. *United States,* 258 Fed. 413.
Ashapa v. *Reed,* 280 Mass. 514, at 516.
Indiana Farmer's Guide Publishing Co. v. *Prairie Farmer Publishing Co.,* 293 U.S. 268.
Gigoux v. *Henderson,* 107 Kans. 325.
Queeney v. *Willis,* 225 N.Y. 374.
Stevens v. *Ross,* 1 Calif. 94, at 98.

The respondent therefore respectfully submits that the findings of the Trial Court, as supported by the evidence appearing in the transcript of record, preclude the necessity of this Court's passing on the question of law the petitioner would present, and that the judgment should be allowed to stand.

II. The decision of the Supreme Judicial Court of Massachusetts in this case sustaining the rule of law sought for by the respondent was in accordance with the spirit and purpose of the Bankruptcy Act and is supported both by the authorities and on principle.

In order properly to approach the question here involved, which is one of statutory interpretation of sections 60*a* and 60*b* of the Bankruptcy Act, the respondent submits that it is necessary to ascertain the principles and purposes of the Bankruptcy Act.

At common law it was the diligent creditor who was favored. This principle came to be inadequate in the doing of justice in the cases of insolvency in this period of large commercial dealings on credit. The Bankruptcy Law is founded upon entirely different principles. Under that Act the maxim "Equality is equity" governs. The essential principle of the Bankruptcy Law is that all of the bankrupt's property be divided equally, without preference, to the payment of his debts. The insolvent estate is therefore, in theory, a trust fund. It is no longer the property of the bankrupt, for the moment that he becomes insolvent he ceases to be using up his own capital, and therefore, at the moment of insolvency, equity, in the form of Bankruptcy Law, steps in and claims his property a trust fund belonging to all his creditors. (See Remington on Bankruptcy (3d edition), vol. 4, sec. 1625, *et seq.*)

In re Mayo Contracting Co., 157 Fed. 469.
Walker v. *Wilkinson*, 296 Fed. 850, at 852.
Farnsworth v. *Union Trust & Deposit Co.*, 272 Fed. 92, at 94.
Richmond Standard Steel Spike & Iron Co. v. *Allen*, 148 Fed. 657, at 661.
In re Keller, 109 Fed. 118, at 122.
Swartz v. *Fourth National Bank*, 117 Fed. 1.

Clarke v. *Rogers*, 228 U.S. 534.
Keppel v. *Tiffin Saving Bank*, 197 U.S. 356, at 361.
In re Schafer, 5 A.B.R. 146.

The respondent respectfully submits that under the rule of law contended for by the petitioner, to wit, That a creditor is not preferred if at the time of each payment it received no greater percentage of its claim than other creditors could have received if the assets had been distributed at that moment, a patent inequality of distribution will result, which conflicts with the above principles on which the Bankruptcy Act is based.

III. It is obvious that one of the two assumptions must be made if inequality is not to result: (1st) that other creditors did receive the proportionate payment that the favored creditor did at the time of the payment, or (2d) that the creditor receiving the payment accepted it in full settlement.

Under the rule contended for by the petitioner, it appears to make no difference whether either of the assumptions is supported by the facts of the particular case. A creditor retains the right to prove a claim in bankruptcy and share equally with other creditors in the later distribution of the assets. In fact, under the petitioner's rule, it becomes immaterial to determine whether the creditor did accept the payment in full settlement or whether other creditors did receive the same proportionate payment as the favored creditor. Obviously, then, under the petitioner's rule, a creditor could receive preferential treatment and the trustee in bankruptcy would be powerless to correct the situation. In order to make this point clear, the respondent submits to the Court the following theoretical case:

Let us assume that a voluntary or involuntary petition in bankruptcy was filed against a corporation or individual on July 2, 1935. Let us assume further that a trustee in bankruptcy is appointed and brings a suit to recover a payment of the sum of $500 made to a creditor the day before the petition was filed. Let us assume that the Court finds as a fact that the creditor's claim against the bankrupt on July 1st was $1000; that the debtor owed the creditors of the same class as the creditor who received the payment the sum of $10,000; and that the fair value of its assets as of July 1st was $5000. Let us further assume that the Court has found as a fact, as in the principal case, that at the time of the payment the debtor was insolvent and that the creditor had reasonable cause to believe that it was securing a preference. On this set of facts the petitioner would argue that the trustee in bankruptcy could not recover the sum of $500 paid to the creditor, since it received but 50% of its claim and since at the time of the payment all creditors could have received 50% of their claims. Therefore, the petitioner argues, this creditor was not preferred.

It appears clear to the respondent that what is overlooked in this argument is that the $500 received by the creditor was not in payment of its full claim, but merely payment in full of that portion of its claim to which that $500 was applied, and that it still has remaining to it the right to collect the remaining $500 from the debtor or, in the event of bankruptcy, to prove its claim for $500. Assume further that the creditor after bankruptcy does file a proof of claim for $500, and it is fair to assume that at least a dividend of 30% will be paid to creditors after deduction of administration expenses. Thus this creditor would receive $500 before bankruptcy and $300 in bankruptcy, making a total of 80% of its $1000 claim, whereas all other creditors would receive a dividend of 30% of the same multiple of $1000.

Numerous cases have been decided by the Courts involving a set of facts similar to that assumed above, in which this very question of law is raised. The courts have rightly said that to allow a creditor to retain the payment would result in violation of every principle of the Bankruptcy Act.

Commerce Guardian Trust Bank v. *Devlin*, 6 Fed. (2d) 535.
Farnsworth v. *Union Trust & Deposit Co.*, 272 Fed. 92, at 94.
Keppel v. *Tiffin Savings Bank*, 197 U.S. 356, at 361.
In re Keller, 109 Fed. 118, at 122.
Harry J. Jentzer, Trustee in Bankruptcy of Yarns Corporation of America v. *Viscos Co. et als.*, U.S. Dist. Court for the So. Dist. of N.Y. in Equity, 73-157, 1935.
Rubenstein v. *Lottow*, 223 Mass. 227.
Latrobe v. *J. H. Cross Co. Inc.*, 29 Fed. (2d) 210.
Williams v. *Bank of America Nat. Assoc.*, 55 Fed. (2d) 884.
Swartz v. *Fourth National Bank*, 117 Fed. 1, at 7.
In re Watkinson, 146 Fed. 142.
In re Mayo Contracting Co., 157 Fed. 469.
In re Colton Export & Import Co., 121 Fed. 663.
Cohen v. *Goldman*, 250 Fed. 599.
Painter v. *Napoleon Tp.*, 156 Fed. 289.
Bronx Brass Foundry Inc. v. *Irving Trust Co.*, 76 Fed. (2d) 935.
In re Star Spring Bed Co., 265 Fed. 133.
Eyges v. *Boylston National Bank*, 294 Fed. 286.

And there are a large number of cases not here cited in which the Court assumed the rule of law contended for by

the respondent in making its decision. In fact, it would appear that this Court did so in the cases of—

Eau Claire National Bank v. *Jackman,* 204 U.S. 522.

Clarke v. *Rogers,* 228 U.S. 534.

As was well stated in the case of *Bronx Brass Foundry Inc.* v. *Irving Trust Co.,* 76 Fed. (2d) 935 (C.C.A. 2d):

> "Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the situation would have been if the assets had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

And again, in the case of *Commerce Guardian Trust Bank* v. *Devlin,* 6 Fed. (2d) 518, 535, the Court stated:

> "We see no merit in the suggestion that the bank got no greater percentage of its claims (about 48%) than creditors generally would have had if we accept the estimates of the bookkeeper of 50%. The bank actually received 100% on $6,300. of its claim and if the preference were withheld would be entitled to receive on the balance of its claim the same percentage as other creditors of its class."

This principle of interpretation would appear to be borne out by the wording of section 60*a* of the Bankruptcy Act, which states that "A person shall be deemed to have given a preference if . . . he has . . . made a transfer of any of

his property and the *effect of the enforcement of such . . . transfer will be to enable* any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Obviously this section expresses futurity and is looking forward to a later date, *i.e.*, bankruptcy, to determine the effect of the payment.

The petitioner would argue, however, that the wording of section 60*b* conflicts with the foregoing interpretation of the Act. The respondent submits that the words in section 60*b*—"*The transfer then operate as a preference*" must be interpreted in the light of what section 60*a* defines as a preference, *i.e.*, a transfer which will ultimately result in one of the bankrupt's creditors obtaining a greater percentage of his debt than other creditors of the same class. In other words, the receipt of a payment on account by a creditor, since it pays in full a portion of his claim, leaving him in a position to compete with the remaining creditors on an equal basis, *does* "then operate as a preference."

But, says the petitioner, if at the time of payment all creditors could have received a like percentage on their claims as the creditor who actually did receive a payment, where we do find satisfied the requirements of section 60*b* that the creditor shall "then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference"?

The respondent submits that if a creditor at the time of a payment knows, or has reasonable cause to believe, that the debtor making the payment is insolvent, he must know that by receiving full payment of that portion of his account which is paid, and retaining the right to prove his claim for the balance along with other creditors of the same class, he is then being preferred. To argue that "reasonable cause to believe" must mean reasonable cause to believe he is securing a greater percentage than other creditors could then have gotten is to affirm the conclusion. Is this

not clear from the very wording of section 60*b*, which does not provide that the creditors shall have reasonable cause to believe that at the time of the payment he is being preferred, but that the creditor shall then have "reasonable cause to believe that the *enforcement* of such judgment or transfer *would effect* a preference"? These latter words are likewise looking to the future effects of the enforcement of the transfer in the event of bankruptcy.

Ogden v. *Reddish*, 200 Fed. 977.

In fact, request No. 8 of the petitioner appears to do so. Does this mean that under the rule contended for by the respondent all payments on account by an insolvent within four months of bankruptcy are preferential and voidable by the trustee? The answer is "No." Two situations occur to the respondent, and there may be others, under which a payment would not appear to be preferential—(1) Where the payment made was no larger than other creditors could have received at the time of payment and is then accepted by the creditor in full payment and release of all future rights to collect the balance of its claim, and (2) Where, at the time of the payment to the particular creditor, all creditors were actually paid a proportionate share of their indebtedness.

It is interesting to note that the principal cases cited by the petitioner in support of its argument, some of which are hereinafter cited, quote with approval in their opinions the case of *Swartz* v. *Fourth National Bank*, 117 Fed. 1. In that case the Court said, in part:

> "The statement of these facts is in itself a demonstration that if the Bank can retain this money and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of its class who receive no such payment."

The case of *Peck & Co.* v. *Whitmer* (C.C.A. 8th), 231 Fed. 893, cites with approval the case of *Swartz* v. *Fourth National Bank,* as does the decision in the case of *Mansfield Lumber Co.* v. *Sternberg* (C.C.A. 8), 38 Fed. (2d) 614, and *Haas* v. *Sachs* (C.C.A. 9), 24 Am. B.R. (N.S.) 388. It is further interesting to note that, in the case of *Mansfield Lumber Co.* v. *Sternberg,* the creditor received a total of 7.79% of its claim *and executed a general release.* The assets of the bankrupt paid to general creditors of the same class 11%. It will be observed that the debtor here settled its entire claim for 7.79% and did not retain the right to prove the balance of its claim in bankruptcy. The Court therefore found that "there was a failure of proof on the part of the trustee that the transfer operated as a preference." And in the case of *Haas* v. *Sachs* the evidence seems to establish that at the time of the hearing the assets of the estate had been liquidated so as to award a dividend of 20% to creditors, whereas the money received by the creditor whose claim was objected to amounted to 10% of his claim.

In referring to the cases of *Peck & Co.* v. *Whitmer,* and *Haas* v. *Sachs,* Patterson, D.J., in the case of *Jentzer* v. *Viscos Company et al.* (see *supra*) well stated:

> "In those cases sight seems to have been lost of the fact that the creditor who received the payment on account of his claim retained the balance of his claim for further collection on a parity with other creditors. The case was considered as if the creditor had dedicated the remaining assets to other creditors which was not the fact. The receiving creditor got more than other creditors and it was obvious all along that he would get more if the transfer should be sustained."

The establishment of the rule contended for by the respondent results in an assurance of equality of distribution. The establishment of the rule contended for by the petitioner

would result in the destruction of any such assurance. An example will illustrate the point.

Suppose a creditor is owed the sum of $1000 and that over a period of thirty days prior to the bankruptcy it receives ten payments each in the sum of $100, the payments being three days apart. Suppose further that, at the time of each payment, the debtor's assets, if then distributed, would have paid a dividend of 50% to all creditors of the same class. The petitioner would appear to argue that these payments were not preferential, since at the time of each payment the debtor received only 10% of its claim and therefore was not then preferred and could not then have reasonable cause to believe that it was being preferred. Actually, it received payment in full as a result of the payments. Would this Court, therefore, refuse relief to the trustee? Such a result certainly was not intended by the Bankruptcy Act, but would appear to follow under the rule contended for by the petitioner.

In addition to the arguments heretofore given, there are practical arguments in favor of the respondent's rule. As was well stated by the Supreme Court of Massachusetts in the case of *Rubenstein* v. *Lottow* (see *supra*) in commenting on the rule of law contended for by the respondent which was the same as that contended for by the petitioner here—

> "If the defendant's contention is sound, the bankruptcy court well might be required, in the case of successive preferences, to enter into prolonged investigations as to the precise ratio to each other of the bankrupt's debts and liabilities at numerous different dates within the four months' period preceding the filing of the petition. Such judicial investigations inevitably would cause expense to the public and to the trustee representing the other creditors, and could confer no advantage on the debtor. They could benefit no one

except a creditor who had accepted a preference, having reasonable cause to believe that he thereby was securing a preference from a bankrupt debtor. It cannot be presumed that such extreme solicitude at such cost would be manifested by the law for such a creditor, in the absence of words expressing an unmistakable purpose to that end. The words of the act disclose no such design. On the contrary, they tend in the opposite direction.

"The interpretation urged would result in inequality of distribution of the debtor's assets among his creditors. Equality of distribution is one of the fundamental objects of a bankrupt law. The indebtedness of a business man often gradually progresses from a nascent state of insolvency to the point where a petition in bankruptcy is filed. Beginning with a bare excess of debts over assets, he may go through the gamut to a very large and disproportionate excess in this respect. Preferences during such a period of declining ratio of assets to debts, adjusted according to the theory of the law now put forward, would result in a sliding scale of inequality between the various preferred creditors, as well as inequality between all creditors who have obtained preferences and the general creditors who depend upon the equality of the law to protect their interests against the alertness of creditors seeking unequal advantages through their own keenness in scenting approaching bankruptcy."

IV. If this Court shall determine that the interpretation given to sections 60a and 60b of the Bankruptcy Act by the Supreme Court of Massachusetts in deciding the principal case was erroneous, and that the findings of fact did not make this error immaterial, the respondent submits that this Court should remand this cause to the Trial Court for further hearing, to allow the introduction of evidence on the question as to whether or not at the time of each payment the petitioner was preferred under the amended interpretation which may be given to sections 60a and 60b of the Bankruptcy Act by this Court.

The respondent has proceeded from the first and properly under the assumption that the rule of law set forth by his own Supreme Court was correct and presented his evidence in accordance with the rule then existing. If it should now appear that this rule was not correct, it appears to the respondent that it would be working an injustice to prevent him from having the opportunity to represent to the Trial Court such evidence as will allow him to recover under the principles which may be enunciated by this Court. The evidence may well sustain a finding under either rule. Citation of cases is not needed on the point that it is within the right and power of this Court to remand a case to the Trial Court for new hearings if to do so will accomplish justice.

Conclusion.

The respondent respectfully submits that the principle of law contended for by him is correct and should be sustained by this Court; that in any event, under the rule of law contended for by either the petitioner or the respondent, the verdict is justified and should be allowed to stand, and that, in all events, if the principle of law contended for by the respondent is not correct, and the findings of fact do

not justify the verdict, the case should be remanded to the Trial Court for the hearing of evidence on the additional issues resulting from the reversal of the interpretation given to the relevant sections of the Bankruptcy Act by the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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HARRISON J. BARRETT,
MATTHEW BROWN.